No. 92-1402

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C & C REALTY, INC., and ANGELO CARBONE,

Petitioners,

vs.

TOWN OF CLARKSTOWN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, OF THE STATE OF NEW YORK

BRIEF FOR *AMICI CURIAE* INCORPORATED VILLAGES OF WESTBURY, MINEOLA AND NEW HYDE PARK; NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS; AND AMERICAN REF-FUEL COMPANY OF HEMPSTEAD IN SUPPORT OF REVERSAL

LAWRENCE W. BOES
Counsel of Record
FULBRIGHT & JAWORSKI L.L.P.
666 Fifth Avenue
New York, New York 10103-3198
(212) 318-3289

(For Further Appearances See Reverse Side of Cover)

JEROME F. MATEDERO, ESQ.
Village Attorney of the
Incorporated Village of Westbury
325 Maple Avenue
Westbury, New York 11520
(516) 338-4100

JOHN M. SPELLMAN, ESQ.
JOHN P. GIBBONS, JR., ESQ.
SPELLMAN & WALSH
Counsel for the Incorporated Village of Mineola
59 Hilton Avenue
Post Office Box 7775
Garden City, New York 11530
(516) 747-1640

STEVEN M. ORBON, ESQ.
Village Attorney of the
Incorporated Village of New Hyde Park
414 Jericho Turnpike
New Hyde Park, New York 11040
(516) 352-0544

DONNA M.C. GILIBERTO, ESQ.
General Counsel to the New York
State Conference of Mayors and Municipal Officials
119 Washington Avenue
Albany, New York 12210
(518) 463-1185

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Miscellaneous

Introduction

This brief is submitted by a coalition of amici curiae in the State of New York. They share a close interest in the arguments for and against the constitutionality of State-authorized municipal "Flow-Control" laws and wish to set forth their particular interest in this case, resulting from their own practical experiences and litigation resisting a regime of "flow control" laws imposed by another municipality purportedly authorized by state law.

Participating in this brief are the Incorporated Villages of Westbury, Mineola and New Hyde Park, three suburban villages of sizable populations in the Town of North Hempstead, Nassau County, New York; the New York State Conference of Mayors and Municipal Officials ("NYCOM"); and the American Ref-Fuel Company of

Hempstead ("American Ref-Fuel"), a privately owned entity that operates a resource recovery (waste-to-energy) plant one-half mile south of the Village of Westbury.

I. INTERESTS OF THE *AMICI CURIAE*

A. The Incorporated Villages of Westbury, Mineola and New Hyde Park

The Incorporated Villages of Westbury, Mineola and New Hyde Park (the "Villages") are incorporated municipalities geographically located in the Town of North Hempstead, Nassau County, on Long Island, New York. (For almost all governmental functions, the Villages' areas are carved out by state law from the towns' constitutional and statutory jurisdiction. See N.Y.S. Const. Art. IX, § 2(d); N.Y. Munic. Home Rule Law §§ 10(5), 11(3); N.Y. Town Law § 132.) These villages comprise populations of about 14,000, 20,000 and 10,000 residents, respectively. (U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract Supp., 1988 County and City Data Book, pp. 768-69 (as of 1986, Westbury -- 13,640, Mineola -- 20,180 and New Hyde Park 9,510 residents).) They derive their revenues substantially from real property taxes, supplemented by administrative fees and penalties, parking meter fees and decreasing amounts of grants from federal and state funds. The Villages exercise a variety of local government powers, including enacting and enforcing building and zoning laws, minor police powers, maintenance of local streets, parks and recreational facilities, and the collection of garbage.

An ever increasing amount of these Villages' expenditures is devoted to collection, management and disposal of garbage or solid waste, collected by the Villages' sanitation departments and employees. These employees, using the Villages' sanitation trucks, periodically collect solid waste, both "recyclables" (newspapers, metals, glass and certain plastics and

compostable yard waste) and the non-recyclable residue which comprises about 75% to 85% of all such municipal solid waste ("MSW"). (See Rathje and Murphy, Rubbish! The Archaeology of Garbage 204 (1992) (estimating recyclables to be 15% of all MSW with a projected goal of 25% by the end of 1992).) Villages, cities, towns, special sanitary districts and other municipalities on Long Island (Nassau and Suffolk counties in New York State) historically exercised their own municipal powers under state law and under their general home-rule powers to dispose of this solid waste by various methods, but almost all utilized landfills are located in large part in unincorporated areas of the towns, the villages being more densely inhabited communities with little or no open areas.

Beginning in 1986 and continuing to date, these three Villages, which maintain their own municipal

sanitation collection departments, plus three other sizable villages with similar operations and about twenty-five other villages of varying sizes, which utilize private carters or public sanitary districts to collect residential solid waste, have been subjected to the Town of North Hempstead's "Flow Control" law (similar to the Town of Clarkstown's law) monopolizing the disposal of all solid waste generated or collected within the Town's boundaries, purportedly as authorized by state laws specifically enacted for the Town of North Hempstead (the "Town" or "North Hempstead") and its Solid Waste Management Authority (the "Authority"). As detailed in Point II infra, the Town imposed and the Authority receives monopoly-determined "tipping fees" for all solid waste collected by the villages and other public and private solid waste collectors. These fees have no necessary or legal relationship to the Authority's actual

disposal functions and costs, which transfers up to $2 million per year to the Town. Furthermore, even though "Flow Control" is usually justified in the name of financing the construction of solid waste facilities adequate to a municipality's long-term needs, the Town and Authority never implemented the original plan to build its own solid waste facility after five years of "Flow Control." The Town and Authority formally abandoned all such plans in early 1992, subcontracting all solid waste functions to subcontractors after an appeal against the Villages based on a purported "solid waste management program." Town of North Hempstead v. Inc. Village of Westbury, 153 Misc.2d 225, 581 N.Y.S.2d 536 (Sup. Ct. Nassau County 1991), rev'd, 182 A.D.2d 272, 588 N.Y.S.2d 293 (2d Dep't 1992), appeal dismissed, 80 N.Y.2d 1023, 592 N.Y.S.2d 671, 607 N.E.2d 818 (1992), appeals denied, 81 N.Y.2d 706, 597 N.Y.S.2d 936, 613 N.E.2d 968 (1993), motion for

reargument pending, Motion No. 93/456 (N.Y. Ct. App. submitted April 26, 1993).

As a result, the Villages and others in North Hempstead have been isolated from the solid waste disposal market and have been precluded from dealing with other governmental and private entities, such as American Ref-Fuel, which would provide disposal services within or without the county and state at a cost of at least $15 to $30 below the Town's monopoly-determined rates.

Therefore, the Villages and other villages in North Hempstead, which have supported the three Villages in related litigation brought against them in the New York State courts, support reversal of the decision which is now before this Court for review and urge its reversal, not solely on behalf of the private carters and disposal companies that are obviously disfavored by "Flow Control," but also on behalf of the Villages' taxpayers and residents

who are compelled to pay higher government-imposed fees, resulting in higher village real property taxes, that have no relationship to the actual disposal costs. Furthermore, artificially high "tipping fees" for the municipalities and agencies collecting them have engendered a perverse disincentive for the development of local waste reduction, recycling and composting programs in North Hempstead, because the town relies upon receiving maximum solid waste revenues in order to avoid raising its own taxes.

B. The New York State Conference of Mayors and Municipal Officials

The New York State Conference of Mayors and Municipal Officials ("NYCOM") is a not-for-profit, voluntary membership association for the cities and villages of the State of New York, which has as its goal the promotion of efficient municipal government. NYCOM's current membership consists of 59 of New York

State's 62 cities and 488 of its 558 villages, thereby representing the great majority of such municipalities.

In cooperation with cities and villages, NYCOM advocates and supports legislation, participates in litigation and provides information and education beneficial to the administration of municipal affairs and opposes legislation detrimental to cities and villages and the people therein. NYCOM also has a vital interest in the outcome of this and other cases because they will substantially affect the ability of its membership to contract freely for solid waste disposal services inside and outside of New York State. This ability to contract freely is essential to the effective functioning of local governments.

NYCOM has expressed its opposition to Flow Control legislation to Governor Cuomo of New York State and to the State's legislative leaders in the form of various

communications. NYCOM's primary aim is to safeguard those municipalities and public agencies obtaining "Flow Control" powers from using them to raise general fund revenues by mandating the disposal of solid waste at ""tipping fees" rates higher than the municipalities' actual disposal costs. Additionally, NYCOM was an amicus curiae in the case of Town of North Hempstead et al. v. Incorporated Village of Westbury., which involved the constitutionality of Flow Control in North Hempstead.

The authority to enact local Flow Control legislation has been granted to nearly half of New York's counties and to a smaller number of towns, cities and villages. NYCOM members represent the level of local government most directly involved in the collection of solid waste, and which thereby are most directly affected by Flow Control legislation.

III. A CASE HISTORY OF TOWN "FLOW CONTROL" LAWS AS THEY AFFECT OTHER MUNICIPALITIES AND TAXPAYERS

The Prologue: In 1983, as the seepage of toxic waste from industrial and municipal landfills was found to pollute the deep aquifers providing the water supply upon which Long Island's population depends for its needs, New York State enacted legislation banning all landfills on Long Island as of December 18, 1990. 1983 N.Y. Sess. Laws, Ch. 299, adding § 27-0704 of the N.Y. Environ. Consev. Law. The thirteen towns in Nassau and Suffolk counties, together with the two cities and many of the incorporated villages, capitalized on this "crisis" by planning State-encouraged solid waste management programs, including plans for "resource-recovery" plants, i.e., incinerators which also utilize the combustion heat to

generate electricity from steam power for sale to the local power company.

Also planned and implemented, and particularly effective at the most immediate local level, are recycling programs, requiring residents, commercial and industrial businesses, and public and private carters to separate recyclables, such as newspapers, metal cans and glass containers, "white metal" (discarded refrigerators and other household appliances), yard waste and construction and demolition debris ("C&D") for pick-up and delivery to public and private recycling facilities. These programs still leave the vast bulk (over 75% to 85%) of such MSW to be eventually discarded in "sanitary landfills" or burned. (See P. 4, supra.)

The Flow Control Laws: The officials of the Town, within whose borders the Villages are either wholly or partially located, developed an elaborate plan for a variety

of solid waste facilities, including a waste-to-energy incineration plant, a "materials recovery facility" or "MRF" composting and other facilities to be built on a 60-acre portion of a 460-acre sand and gravel quarry specifically purchased for this purpose in the Town's unincorporated areas near Port Washington. In order to implement this plan, the Town requested and the State enacted a "special law" (a "special law" is a law which "applies to one or more, but not all, counties, . . . cities, towns or villages." N.Y. Const. Art. IX, § 3(4)), Chapter 544 of the 1983 N.Y. Session Laws, authorized and directed the Town to enact a "Town-wide" Flow Control law. This State law, which generally tracks about sixty similar State laws enacted from 1975 through 1982, authorizing specific counties, towns, cities and groups of villages to enact Flow Control laws, also mandated the Town to determine and collect "tipping fees" for the centralized disposal of North

Hempstead's solid waste in Town-designated facilities, specifically, in order to obtain sufficient revenues to enable the Town to repay public bond financing for the construction and operation of the solid waste facilities to be built.

A second State law was enacted in 1984 to create a Solid Waste Management Authority (the "Authority") a "public authority" to which the Town in 1988 delegated its solid waste powers, responsibilities, personnel and property. (N.Y. Pub. Auth. Law. § 2049-a-x; see Caro, The Power Broker: Robert Moses and the Fall of New York 16, 632 (1974), for a thumbnail description of the New York "public authority" as a financing device supposedly "outside and above politics," yet this particular law made the elected Town Board the Authority's ex officio Board of Directors.)

In July 1986, after the Town had already cleared several regulatory and environmental hurdles in developing its plan, it enacted its own local Flow Control law, as a section of the Town's Sanitation Code, requiring that all acceptable solid waste and recyclables "generated or originated within the town, including municipalities located wholly or in part therein," be delivered to and disposed of in Town-designated facilities. (Amended Local Law, ch. 46, amending "Sanitation Code of the Town of North Hempstead," § 46-14(A), summarized in Town of North Hempstead v. Inc. Village of Westbury, 182 A.D.2d at 276-77, 588 N.Y.S.2d at 296.)

The Town Changes Its Direction: After the Town's engineering and legal consultants spent two and one half years developing the plan, the Authority purchased the 460-acre property for about $34 million and pledged its "tipping fee" revenues in a secured bank loan, however, a

newly elected Town Supervisor took office in January 1990. Pursuant to the "mandate" of his election campaign the Town systematically dismantled all plans because of "NIMBY" opposition to the construction of a resource recovery plant, notwithstanding that the Town's only landfill was subject to a statutory deadline of December 18, 1990. ("NIMBY" means "Not in my backyard." See Rathje and Murphy, Rubbish!: the Archaeology of Garbage 109, 208-09 (1992).) Nevertheless, the Town failed to develop any alternative plan, hoping that a sympathetic N.Y.S. Department of Environmental Conservation (the "DEC") would extend the deadline, which it did for one month, but a noxious gaseous stench and liquid seepage from the landfill caused a public storm and the Town's landfill was officially closed on January 19, 1991.

For almost two years from January 1991 through November 1992, the Town and its Authority entered into a series of emergency short-term contracts with a private carting company to transport North Hempstead's solid waste collected from its 216,000 residents and numerous businesses to unidentified out-of-town and out-of-state landfills and plants. (U.S. Dep't of Commerce, Bureau of Census, Statistical Abstract Supp., 1988 County and City Data Book, at 771 (as of 1986, Westbury -- 13,640, Mineola -- 20,180 and New Hyde Park 9,510 residents.) The reporter of Page One article in the N.Y. Times followed a Westbury resident's garbage from his backyard pick-up to a landfill site in Taylorville, Illinois. (S. Lyall, From L.I. to Angry Illinois: A Five-Day Trash Odyssey, N.Y. Times, Dec. 26, 1991, p. A-1.) Basically all of Westbury's residential MSW (with certain temporary and limited exceptions) must be trucked from Westbury in its

sanitation department's trucks five miles to a temporarily authorized and remotely located "transfer station" and, trucked from there by a private sub-contractor to its MRF in Greenpoint, Brooklyn, for further transhipment to out-of-town and out-of-state landfills in Pennsylvania, Ohio, Indiana or Illinois.

The Rates Climb: Of course, during this history of legal monopolization by the Town and Authority, the Authority's "tipping fee" rate, as unilaterally determined, rose from $16 per ton in 1976 to $66 per ton in 1990, and to $87 per ton in January 1991. The new Town Supervisor threatened in 1990 that the rate would rise to $125 or $150 or more per ton within a few years, but the Town and Authority actually raised the rate to $106 per ton in late 1991 and adjusted it to $104 per ton as of November 1992, as a result of pressure from the Town's Village Mayors. (See M. Whitely, Mayors "Jilted" - Town

Files Injunction, Westbury Times, Feb. 20, 1992, p. 4, cols. 3-4.)

There is no assurance, however, that this rate will ever be limited by actual disposal costs as determined by the regional solid waste disposal market created by private carting contractors and other disposal alternatives available to the Town and its Authority. The Town and Authority assert the legal right to determine the rate on the basis of their own governmental needs without consulting with their involuntary public and private "customers." (Id.; C. Gordon, Court Backs Town's Trash Control Right, Newsday, Aug. 21, 1992, p. 27.)

In contrast to the chaotic conditions of solid waste disposal in North Hempstead, Westbury, Mineola and New Hyde Park have had available, virtually in their backyards, a state-of-the-art resource recovery plant owned and operated by American Ref-Fuel and located

barely one-half mile south of Westbury in the neighboring Town of Hempstead, one and one-half miles from Mineola and about three miles from New Hyde Park. (See D. Mock, Inside the Hempstead Town Incinerator, Westbury Times, Jan. 23, 1992, p. 1.)

The Villages Bolt: When the North Hempstead landfill was closed in January 1991, Westbury's and Mineola's officials felt compelled by their fiduciary duties to deliver all or at least part of the Villages' MSW to the Hempstead plant at a "tipping fee" rate far below the official monopoly rate determined by North Hempstead and its SWMA. Westbury and Mineola entered into short-term contracts in late January 1991, to dispose of their solid waste or some portion thereof at American Ref-Fuel's Hempstead Resource Recovery Facility at a rate of $67 per ton -- versus the $87 per ton "tipping fee" then mandated by the Town of North Hempstead. The Villages also had

available to them the disposal facilities of American Ref-Fuel's sister resource-recovery plants in Essex County, New Jersey, and Preston, Connecticut, which had excess capacity to take MSW from Long Island. Also available were cheaper landfill alternatives then utilized by North Hempstead's favored subcontractor.

The Town and Authority Sue: As a result of these actions taken by the Villages, the Town and Authority commenced a legal action in the New York State Supreme Court, Nassau County, against Westbury, Mineola and American Re-Fuel. Town of North Hempstead v. Inc. Village of Westbury.

At the outset Westbury and Mineola stipulated they would comply with the Town's Flow Control law pending the lower court's final decision. That court granted Westbury's cross-motion for summary judgment declaring the State and Town laws unconstitutional under

the State Constitution and the Town's Flow Control law invalid as not clearly authorized by State law to supersede the Villages' powers. 153 Misc. 2d at 237-39, 581 N.Y.S.2d at 543-45. Companion actions by two other villages, including Great Neck Plaza and New Hyde Park, were initiated and virtually all of the Town's thirty villages participated by writing letters to the court and by filing an amici curiae brief on appeal in support of the order declaring "Flow Control" unconstitutional. Id. at 233, 581 N.Y.S.2d at 541; 182 A.D.2d at 280, 588 N.Y.S.2d at 298.

In addition, the decision of the New York Supreme Court (Wager, J.) dated December 20, 1991, stated as follows:

> In closing, the court opines that to the extent that the State gave the Town flow control power, if did so with the intention of providing the Town with a funding mechanism to construct a resource recovery facility. Were Chapter 544 and the Flow Control Law validly enacted, the court

> would nonetheless have been reluctant to grant the Town a permanent injunction allowing it to continue collecting tipping fees. These fees which should have been used to finance a resource recovery facility for the benefit of all the Town residents, have instead been used to finance, at best, a questionable purchase of 460 acres of land which is apparently not being used for any solid waste purpose as well as to pay for the out of Town shipment of the Town's solid waste and to maintain the salaries of allegedly unnecessary Authority personnel. The Town has failed to accomplish the stated solid waste disposal purposes of the legislation. Furthermore, it has been alleged that the villages individually could obtain, for themselves, out of Town shipment at a substantially lower cost than they are now required to pay to the Town.
>
> The court is aware of the financial stress this decision places on the Authority. However, this does not justify ignoring the home rule provision of the State Constitution. Nor should the plight of the Authority alone force the residents of the villages to bear the expense of the Town's ill-fated policy.

Id. at 239-40, 581 N.Y.S.2d at 545.

In the Interim: Based upon this final decision and pursuant to Westbury's and Mineola's stipulation to comply with Flow Control only until that decision was entered, these two Villages once again began transporting all or part of their MSW to American Ref-Fuel's plant for disposal at rates up to $30 per ton cheaper than the Town's new rate of $106 per ton effective in January 1992. After five weeks, the Town and Authority obtained an interim order from the Appellate Division, Second Department, expediting the civil appeal, which would otherwise take about two years from briefing to oral argument, and directing the two Villages to comply with the Town's Flow Control law pending their appeal.

Interestingly, after the appeal from the Supreme Court, Nassau County, had been taken, the Town's Supervisor admitted in February 1992 that the Town's solid waste management policies were wasteful

and that no state goal was furthered through its and the Authority's current activities. He described its solid waste disposal costs as "enormously expensive," that the previous Town administration's purchase of a 460-acre site solid waste disposal facilities "did all of a great disservice" because "the Town has to pay the banks millions in debt service" (meaning the Authority must do so funded by inflated "tipping fees" charged to the Villages and others), and that the Town engaged in "an irresponsible waste management program that laid waste to our environment." Because yard waste and leaves constitute a major part of the waste stream in spring, summer and fall, he maintained that, "To pay money to dispose of nature's recyclables is a crime" (however, the Town and Authority were then charging the Villages a rate of about $106 per ton for compostable wet leaves, the same as non-recyclable MSW, throughout this period), and concluded his

discussion of solid waste by pointing out that North Hempstead's previously planned incinerator was obviously proved to be unneeded because "we are surrounded by excess capacity and incinerators desperate for waste the same way a junkie craves a fix." At the same time, the, Town's attorneys were urging before the appellate court that the Town's Flow Control law must be enforced. The Town and Authority urged that the Villages be enjoined from utilizing these "excess capacity" and "desperate" private facilities as close as a half mile away and at "tipping fee" rates at least $30 per ton cheaper than the fee of the Town's mandated facility. (1992 State of the Town Message by North Hempstead Town Supervisor, Feb. 7, 1992, reproduced in Westbury's Appendix, pp. WA00250, at 252, 256, 259-60, 261, Town of North Hempstead v. Inc. Village of Westbury, 182 A.D.2d 272, 588 N.Y.S.2d 293 (2d Dep't 1992).)

The Intertwined Clarkstown and North Hempstead Appeals: The Appellate Division, Second Department, probably the busiest, most overtaxed and undermanned appellate court in the country, had, unbeknownst to Westbury's and Mineola's attorneys, already heard the appeal in this case, C&A Carbone, Inc. v. Town of Clarkstown, about three months earlier in November 1991. The court therefore expedited North Hempstead's appeal and it was briefed and heard in March 1992, less than three months after the lower court's decision.

In August 1992 the Appellate Division completely reversed the decision and order of the lower court in Town of North Hempstead v. Village of Westbury by granting the Town's and SWMA's motion for summary judgment, declaring the State and Town laws constitutional and valid and enjoining Westbury and Mineola from violating the Town's Flow Control law. - 182 A.D.2d 272, 588

N.Y.S.2d at 293. In a companion action brought by the Village of Great Neck Plaza the appellate court rejected its argument that enforcement of the Town's Flow Control law was conditioned on constructing the planned solid waste facilities, see id. at 281-82, 588 N.Y.S.2d at 299, although also relying upon the state law rationale that Flow Control is not "unconstitutional because it provides a funding mechanism for financing the construction of resource recovery facilities . . . ." Id. at 284, 588 N.Y.S.2d at 300.

Two weeks later, the Appellate Division, Second Department, by a different panel decided C&A Carbone v. Town of Clarkstown, acknowledging the Petitioners' claim herein "that the enactment of the local law was financially motivated . . . ." 182 A.D.2d at 220, 587 N.Y.S.2d at 685. That court justified this critical concession by contending that, "A concern for the continued economic viability of a

solid waste management facility established pursuant to such a [solid waste management] plan does not negate or detract from, but in fact is a part of the health, safety, and environmental concerns such plan is designed to address," citing Town of North Hempstead v. Village of Westbury, while ignoring that North Hempstead acknowledged it had no DEC-approved plan nor any solid waste facility to be constructed from Flow Control revenues. Id. at 221, 587 N.Y.S.2d at 685-86. The court also emphasized in C&A Carbone that the State legislation authorizing Flow Control after the Town of Clarkstown had already passed its law confirmed "the 'governmental and public purpose' of 'displacing competition' so that public welfare rather than profit is the focus of solid waste management," 182 A.D.2d at 221, 587 N.Y.S.2d at 686, while brushing aside that Clarkstown's law mandated supra-competitive profits by charging $11 per ton over the private transfer station's

"tipping fee," or that North Hempstead's fee was admittedly "enormously expensive," $20 to $30 higher than American Ref-Fuel's fee.

Subsequently, in Town of North Hempstead v. Village of Westbury, the New York Court of Appeals denied review by right and by leave. 80 N.Y.2d 1023, 592 N.Y.S.2d 671, 607 N.E.2d 818 (1992); 81 N.Y.2d 706, 597 N.Y.S.2d 936, 613 N.E.2d 968 (1993). Nevertheless, even though the Town and Authority urged that no Commerce Clause claim had been raised by Westbury and Mineola in that case, the Court of Appeals has not denied the Villages' motion for reargument, which has been pending for over two months after learning that this Court had granted review of the Town of Clarkstown case. Motion No. 93/456 (N.Y.Ct. App. submitted April 26, 1993).

Retaliatory Lawsuits: At about the same time as the Villages' motion for reargument was made, urging

that the Villages' and C&A Carbone cases were inextricably intertwined, the Town and Authority retaliated by commencing a second series of legal actions, one against Westbury and Mineola for money damages sustained and civil penalties incurred during the one-month period in January 1992 during which Westbury allegedly failed to deliver 900 and Mineola 1100 tons of MSW, respectively, to the Town's transfer station. They also sued New Hyde Park on similar claims, but for larger amounts of MSW allegedly not delivered to the Authority's transfer station. Westbury filed an answer and counterclaim in its action, alleging that the State and Town Flow Control laws impede and preclude it from dealing with American Ref-Fuel and related entities under its right pursuant to the Commerce Clause to dispose of its MSW in the free market of interstate commerce.

This case history of these closely related cases demonstrates that State and Town Flow Control laws not only directly impede interstate commerce in solid waste performed by private carters and owners of private recycling centers and transfer stations, they also substantially raise the costs of villages, cities and other municipalities and taxes of these municipalities, and keep them from utilizing cheaper, more suitable and more efficient public and private facilities with excess capacity that would benefit from this business. To strike down Flow Control in the egregious circumstances present in North Hempstead or Clarkstown does not endanger local governments' legitimate efforts to statutory and regulatory safeguard their residents from solid waste pollution and other sound objectives. Instead, when Government becomes a monopoly profiteer in disposing of

solid waste, all incentives for reduction and recycling programs fly out the window.

The Newspaper Story: One of the most egregious effects of "Flow Control" in North Hempstead is, for example, its treatment of the Villages' newspapers waste. Collected newspapers are collected every Wednesday in Westbury from the residences' curbside and trucked over five miles to the Authority's only transfer station and there deposited pursuant to a 1986 Recycling Agreement supposedly "free of charge" (actually, of course, Westbury and Mineola pay the cost of disposing of "recyclables" by increased fees on other MSW). Westbury's empty trucks return five miles to the Village, followed by the Authority's private trucker's larger trucks filled with Westbury's and other municipalities' newspapers bound for a private recycling company barely one-half mile east of Westbury. So much for efficiency and economy.

Peculiar Facts Concerning the
Incorporated Village of New Hyde Park

The so-called "Flow Control" laws of the State of New York and the Town of North Hempstead have created certain legal and practical problems for the Incorporated Village of New Hyde Park because it is only partially located in North Hempstead.

New Hyde Park is nearly equally split by the territorial boundary line separating the Towns of Hempstead and North Hempstead. However, their local laws differ markedly. Hempstead's code specifically provides that its solid waste regulations apply only to municipalities lying fully within that town's territorial borders, thereby in legal effect "exempting" New Hyde Park from its control. North Hempstead, on the other hand, made its "Flow Control" fully applicable to all areas lying within that town's geographical limits, thereby

"annexing" the northerly half of the Village of New Hyde Park into its solid-waste jurisdiction.

This dichotomy resulted in the creation of a legal and practical conundrum for New Hyde Park; while it is free to carry out its own waste collection regulations and procedures in the Hempstead portion of the village, and dispose of those collections pursuant to contracts negotiated by its Board of Trustees in its residents' and taxpayers' best interests, it is forced to impose and carry out North Hempstead's regulatory requirements in its northerly half, disposing of the garbage collected in that portion at the Authority's transfer station at costs dictated by that agency. New Hyde Park's own officials have no say in those matters whatsoever, a source of ongoing friction between the Town and Village.

Garbage collection and disposal costs have always been funded as a Village-wide charge, paid out of the

budgetary appropriations of its General Fund. Village taxpayers foot the bill for all solid waste collection and disposal on an equalized basis.

As a result of New Hyde Park being compelled to dispose of solid waste generated within the North Hempstead portion of the Village at the Authority's artificially high rates, $30 ormore abovee "spot market" rates, New Hyde Park's taxpayers are forced to pay significantly higher costs to subsidize those operations than the Village incurs for the disposal of its Hempstead residents' garbage.

Also, since the only means available to New Hyde Park to control its sanitation costs lies in waste reduction and recycling, it requires "source separation" of bulk pick-ups (such as old furniture), "white metal" (refrigerators, appliances and similar items), concrete and construction debris, grass clippings, similar yard waste and leaves, from

household or routine MSW. All recyclables are picked up and disposed of on a Village-wide basis, and with the exception of glass, cans and newspapers (all of which are disposed of, "at no cost," at the Authority's transfer station), the Village disposes of other recyclables at facilities and prices contracted by the Village Board. It is that practice which has resulted in a lawsuit for $1 million in money damages and $1 million in civil penalties being filed by the Town and Authority against New Hyde Park, the premise of that action being that they are entitled to receive all such waste at the Authority's transfer station under North Hempstead's Flow Control law, and that they were deprived of the "profits" to be realized by the payment of "tipping fees" established by them with respect to those recyclables and other waste directed to other facilities.

While New Hyde Park is confident that a motion to dismiss this action will be granted, indications are the Town will seek to file subsequent notices of claim and will continue to pursue the matter on the merits. In such event the Village is prepared to defend vigorously, raising constitutional and other affirmative defenses in its behalf, including arguments that the state enabling act and the Town's local laws enacted pursuant thereto, or their application to the Village, violate the provisions of the Commerce Clause of the United States Constitution.

IV. SUMMARY OF ARGUMENT

The amici curiae cannot and will not attempt to improve upon the legal arguments made by Petitioners herein under the Commerce Clause jurisprudence of this Court. They can, however, point out that Flow Control laws of local municipalities, usually authorized or mandated by specific state laws upon some regional basis,

severely affect the powers, responsibilities and taxes of those other legal governments that actually collect the solid waste. These municipalities must now dispose of their solid waste pursuant to the unilaterally determined fiats and economic terms of an "umbrella" government such as the Town and Authority that have little or no function except "managing" the "flow" of solid waste and the cash that must flow with it. Not only are "tipping fee" costs artificially raised by "Flow Control," the Villages' taxes must be raised to match those increasing fees. The Villages and other tax-supported municipalities are precluded or "locked in" from dealing with more convenient, more stable and more environmentally safe outlets for their solid waste, such as American Ref-Fuel. In turn, private and public competitors are "locked out" from disposing of North Hempstead's solid waste, because of "sweetheart" deals negotiated by a Town and Authority

that need not themselves raise the funds by taxes to pay for such inflated contracts. And, as the disposal problems are removed from local hands, recycling, composting and waste reduction programs are discouraged as Village and Town trucks transport tons of newspaper waste back and forth across the county. The Authority charges the Village $104 per ton to dispose of compostable wet leaves, a practice the Town Supervisor himself condemns as a "crime." Therefore, rather than rehearse once again the plain dictates of the Commerce Clause, the amici curiae will demonstrate the practical effects of Flow Control by reference to the discussion in the few Flow Control cases that have already been decided in the lower federal courts.

V. ARGUMENT FOR REVERSAL OF THE DECISION OF THE NEW YORK COURT

The earlier case law in this Court on garbage or solid waste as an article of commerce dealt with state and local laws prohibiting, hindering or discriminatorily taxing the import of solid or hazardous waste into a state or subdivision thereof, which laws were generally held to violate the "dormant Commerce Clause" of the U.S. Constitution. E.G., Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S.Ct. 2019 (1992) (holding state and local laws unconstitutional under Commerce Clause, which gave counties option to prohibit import of solid waste whether in-state or out-of-state); Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992) (holding differential fee structure for

imported hazardous waste unconstitutional under Commerce Clause); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (leading solid waste case, holding state law prohibiting solid waste import unconstitutional under Commerce Clause by discriminating against out-of-state waste based on State's "economic protectionism").

Following City of Philadelphia v. New Jersey, the lower federal courts generally held "Flow Control" statutes monopolizing the export of solid waste from a State or its subdivisions constitutional. J. Filiberto Sanitation, Inc. v. Dep't of Environmental Protection, 857 F.2d 913 (3d Cir. 1988) (holding county "Flow Control" regulations constitutional under Commerce Clause in case arising from public vs. private transfer station operations); Harvey & Harvey v. Delaware Solid Waste Auth., 600 F. Supp. 1369 (D. Del. 1985) (holding state authority's Flow Control regulation constitutional under Commerce Clause

as "evenhanded" and nonsignificant burden on interstate commerce, absent proof that such burden outweighs public health and environmental benefits of public landfill vs. private carters' interstate outlets); Hybud Equip. Corp. v. Akron, 654 F.2d 1187, 1194-95 (6th Cir. 1981), vacated on other grounds, 455 U.S. 931 (1982), on remand, 742 F.2d 949 (6th Cir. 1984), cert. denied, 417 U.S. 1004 (1985).

Beginning in 1991, however, the tide of "Flow Control" decisions under the Commerce Clause turned with the decision of a district court in Rhode Island, which was affirmed by the First Circuit. Stephen J. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I.) aff'd mem. substantially on the district court's decision granting preliminary injunction, 947 F.2d 1004 (1st Cir. 1991). In contrast to the previous Flow Control cases, which looked primarily to the statements of statutory purposes and legislative

findings, the federal court in Rhode Island looked at the underlying realities of a state law which required all commercial waste to be brought to a central landfill in Rhode Island at $49 per ton versus bringing it to licensed disposal sites in Massachusetts at considerably lower rates. Id. at 783. The court understood that Rhode Island's state-wide authority needed commercial solid waste at $49 per ton in order to obtain a "profit" to subsidize its central landfill's charges of $14 per ton for Rhode Island's municipalities. The district court analyzed this as conferring "a direct economic advantage" on the Rhode Island public authority "as a participant in the market." Id. at 783.

The court also analyzed the reality of the Rhode Island law which could not be justified as promoting resource recovery by "diverting solid waste from out-of-state facilities where it is burned to generate electricity to

the CLF [central landfill] where it is buried." Id. Nor could the Flow Control regulations be explained as preserving public resources or health of residents. Id. at 784. Nor did it serve to eliminate illegal disposal; indeed, it increased that risk. Id. Nor did Flow Control eliminate potential liability of the State and its municipalities or reduce traffic. Id. at 784-85. Finally, the only plausible rationale for Flow Control -- to facilitate construction of publicly owned waste-to-energy facilities -- was not shown to be achievable by less coercive means when one realizes that Flow Control measures were basically needed because of artificially high or supra competitive "tipping fees" in order to subsidize other activities. Id. at [illegible]. As the court summarized, "In short, the mere fact that construction of a waste-to-energy facility may be a legitimate local purpose does not mean that any method of achieving that purpose is therefore legitimate. The

method selected must be evaluated in light of the burden it places on interstate commerce and the availability of less burdensome alternatives." Id.

To the same effect, see Waste Systems Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1993), aff'g, 784 F. Supp. 641 (D. Minn. 1992) (holding counties' Flow Control ordinances unconstitutional under Commerce Clause); Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth., 814 F.Supp. 1566 (M.D. Ala. 1993) (holding various local Flow Control ordinances unconstitutional under Commerce Clause); Container Corp. of Carolina v. Mecklenburg County, No. 3:92 cv-154-MU (D.N.C. June 22, 1992) (unreported decision; granting preliminary injunction based on probable unconstitutionality of county Flow Control); cf. Government Supplies Consol. Servc. Inc. v. Bayh, 975 F.2d 1267, 1277 (7th Cir. 1992); cert. denied, 113 S.Ct. 977

(1993) (holding state "backhaud" ban, vehicle registration, "tipping fee" and surety bond requirements for solid waste truckers unconstitutional under Commerce Clause). Contra, Town of Clarkstown v. C & A Carbone, Inc. These decisions in the lower federal courts have concluded that Flow Control satisfies no legitimate health or safety concerns of the municipalities but merely feeds their need for revenue producing sources.

V. CONCLUSION

Therefore, it is respectfully submitted that the decisions of the courts herein should be reversed and the

Town of Clarkstown's local Flow Control law and the State's statutory authorization should be declared unconstitutional under the Commerce Clause.

Respectfully submitted,

LAWRENCE W. BOES
Counsel of Record for Amici Curiae
FULBRIGHT & JAWORSKI L.L.P.
666 Fifth Avenue
New York, NY 10103-3198
(212) 318-3289

Jerome F. Matedero, Esq.
Village Attorney of the
Incorporated Village of Westbury
325 Maple Avenue
Westbury, N.Y. 11520
(516) 338-4100

John M. Spellman, Esq.
John P. Gibbons, Jr., Esq.
SPELLMAN & WALSH
Counsel for the Incorporated Village
of Mineola
229 Seventh Street, Suite 100
Post Office Box 7775
Garden City, N.Y. 11530
(516) 747-1640

Steven M. Orbon, Esq.
Village Attorney of the
Incorporated Village of New Hyde
Park
414 Jericho Turnpike
New Hyde Park, N.Y. 11040
(516) 352-0544

Donna M.C. Giliberto, Esq.
General Counsel to the New York
State Conference of Mayors
and Municipal Officials
119 Washington Avenue
Albany, New York 12210
(518) 463-1185

July 16, 1993